guard even when asserted by those whose purpose is the destruction of our institutions. For these reasons, we submit, the federal courts on habeas corpus should be held to have jurisdiction to determine whether fundamental constitutional prerequisites were complied with by military tribunals.

II.

The rule of judicial self-restraint applied by the court below is not appropriate to this case.

The Court of Appeals agreed with petitioners' basic contention that failure of a military tribunal to conduct its proceedings in a fundamentally fair way would render the validity of judgments subject to attack in habeas corpus proceedings. But it added, "habeas corpus will not lie to review questions raised and determined, or raisable and determinable, in the established military process, unless there has been such gross violations of constitutional rights as to deny the substance of a fair trial, and because of some exceptional circumstances petitioner has not been able to obtain adequate protection of that right in the military process" (R. 32). Thereupon, the court took up each of petitioners' allegations, determined that they had been either raised in the military process and had been decided against petitioners, or that the contentions were without substance, or were not jurisdictional. It then concluded that the facts before it did not depict the exceptional case.

1. On habeas corpus federal courts in state custody cases have adopted a rule of judicial self-restraint. See *Darr* v. *Burford*, 339 U. S. 200; *Coggins* v. *O'Brien*, 188 F. 2d 130 (C. A. 1st 1951); *Goodwin* v. *Smyth*, 181 F. 2d 498 (C. A. 4th 1950); *Schechtman* v. *Foster*, 172 F. 2d 339 (C. A. 2d 1949). See also Parker, Limiting

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the Abuse of Habeas Corpus, 8 F. R. D. 171 (1949). It is this rule which here the court below held applicable to the instant case. Federal courts which have adopted this rule consider it essential to the maintenance of the delicate balance in the federal-state relationship involved in our federal system. *Darr* v. *Burford, supra*; *Coggins* v. *O'Brien, supra.* Whatever merits this rule of self-restraint may have in state custody cases,[5] the problems incident to the maintenance of the delicate balance between the United States and its courts and the state and its courts do not come into play, where, as here, a petitioner in federal custody applies to a federal court for a writ of habeas corpus. Thus, the reasons for the application of the federal rule of judicial self-restraint are not here present.

In state custody cases, moreover, before the state convictions can be subjected to collateral attack on habeas corpus in the federal courts they must have been reviewed or denied review by this Court on certiorari. Thus, an accused in a state court is afforded at least one opportunity for this Court to protect his rights before seeking a writ in the federal courts.

2. Courts-martial are courts of inferior and limited jurisdiction. *United States ex rel. Hirshberg* v. *Cooke*, 336 U. S. 210; *Collins* v. *McDonald, supra.* No presumption of legality or validity attaches to court-martial judgments when they are under collateral attack, *Runkle* v. *United States*, 122 U. S. 543, and the grounds essential to the validity of the assailed authority must affirmatively be shown to have existed at the time of its exercise. *Givens* v. *Zerbst*, 255 U. S. 11; *Collins* v. *McDonald, supra; Waite* v. *Overlade, supra; Schita* v. *King, supra; Schita* v. *Cox, supra; Ver Mehren* v. *Sirmyer*, 36 F. 2d 876 (C. A. 8th 1929).

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[5] Even as applied to state custody cases, however, this rule is now the subject of conflict among the circuits. See *United States* v. *Raldi*, 192 F. 2d 540 (C. A. 3d 1951); *cert. granted*, 343 U. S. 403.

If a denial of the substance of a fair trial renders the court-martial judgment subject to attack for invalidity on a habeas corpus, as the Court of Appeals indicates, and if the ingredients essential to the validity of the judgment must be affirmatively established, as the cited cases hold, it would seem to necessarily follow that it is the inescapable duty of the civil court to determine for itself whether those basic ingredients essential to the validity of the court-martial proceedings were in fact present. Such a determination cannot be left to military authorities. Thus, the expanded reach of the writ of habeas corpus, viewed in the light of the concept of limited jurisdiction, is at war with the rule of judicial self-restraint as applied here. See *Hicks* v. *Hiatt*, 64 F. Supp. 238, 249, 250, n. 27 (M. D. Pa. 1946).

3. Judicial scrutiny of military trials by federal courts is more essential than such scrutiny of state convictions. The state judiciary is an independent arm of government and is normally free from the pressures and influences of the executive and prosecuting officials. This is not true of military courts which are subject to command control. In fact it is a fair statement to say that this influence is considered the greatest weakness of military justice and has been the subject of much concern. In the *Report of the War Department Advisory Committee on Military Justice* (1946) (the Vanderbilt Report), at pages 6 and 7 this statement is found:

> "The Committee is convinced that in many instances the commanding officer who selected the members of the courts made a deliberate attempt to influence their decisions. It is not suggested that all commanders adopted this practice but its preva-

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lence was not denied and indeed in some instances was frequently admitted. * * *

"So far as the committee is informed, no steps have been taken in the Army to check or prohibit commanding officers in the exercise of their power and influence to control the courts. Indeed the general attitude is expressed by the maxim that discipline is a function of command."

And the committee goes on to specifically recommend that:

"6. The need to preserve the disciplinary authority of the command and at the same time to protect the independence of the court can be met in the following manner. The authority of the division or post commander to refer a charge for a prompt trial to a court-martial appointed by a judge advocate should be absolute * * * The right of command to control the prosecution and to name the trial judge advocate, who should be a trained lawyer, should be retained. *The Judge Advocate General's Department, however, should become the appointing and reviewing authority independent of command*" (emphasis added).

The suggestion that appointing power be removed from command control, however, has never been incorporated in any revisions of military law.

While criticism of command influence normally concerns the relationship between the convening authority and the courts-martial, at least one authority, Professor Arthur John Keeffe, the former President of the General Courts-Martial Sentence Review Board of the United States Navy, feels that this influence renders even the highest judicial authority in the armed services a partisan rather than an impartial judicial officer. He said in testifying before a sub-com-

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mittee of the Senate Armed Services Committee on the proposed Uniform Military Code:

> "The Judge Advocate General is not, and by the very nature of his office and appointment, cannot be an impartial judicial officer. He is in as inconsistent a position as a commanding officer or convening authority. He is to enforce discipline and he is to give defense. It is for this reason that the English in their reforms have provided that the Judge Advocate General be a civilian appointed on the recommendations of the Lord Chancellor and be responsible to him.
>
> "Significantly, in order to reduce this conflict the English have removed the Judge Advocate General from the control of the Secretaries for State and Air * * *
>
> "To all intents and purposes there is no difference between the Judge Advocate General and a district attorney in civilian life." [6]

4. Military law is a system of articles, rules and regulations established for the government of persons in the military service. It deals in particularity with the maintenance of discipline, within the armed forces. See *Ex parte Reed, supra.* Since ordinary rules of law do not

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[6] At page 252, *Hearing Before a Sub-Committee of the Senate Committee on Armed Services, United States Senate, on S. 857 and H. R. 4080,* 81st Congress, First Session. For other criticisms of Uniform Code of Military Justice for its retention of command influence, see also Keeffe and Moskin, Codified Military Injustice, 35 *Corn. L. Q.* 151 (1949); Langley, Military Justice and the Constitution-Improvements Afforded By the New Uniform Code of Military Justice, 29 *Tex. L. Rev.* 651 (1951); Snedeker, The Uniform Code of Military Justice, 38 *Geo. L. J.* 521 (1950); Note, Military Justice—A Uniform Code For The Armed Services, 2 *Wes. Res. L. Rev.* 147 (1950); Mullally, Military Justice: The Uniform Code in Action, 53 *Col. L. Rev.* 1 (1953).

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seek to cope with problems peculiar to the government of the military establishment, a special set of rules may well be indispensable in prosecuting exclusively military offenses. In such instances, courts-martial and military reviewing authorities may be more competent to determine questions involving military law, usage and internal administration and, therefore, it might be deemed illogical for civil courts to interfere with the determination of such questions by military tribunals. By the same reasoning it would seem crystal clear that civil courts are better qualified to resolve questions of constitutional and fundamental law arising in a criminal prosecution where the offense charged is not of a peculiarly military character and the accused may be tried by either the military or civil authority. "It is an unbending rule of law that the exercise of military power when the rights of the citizen [soldier] are concerned, shall never be pushed beyond what the exigency requires." *Raymond* v. *Thomas*, 91 U. S. 712, 716.[6]

So long as the military services were composed of professional soldiers, there may have been some logic in allowing the court-martial system to determine conclusively the meaning and application of constitutional provisions. Today military personnel is largely conscript and the system of "military justice is the largest single system of criminal justice in the nation. * * *"[7] In addition to their authority over exclusively military matters, military courts have jurisdiction to try all offenses triable in civil courts.

These considerations call for greater rather than less scrutiny by civil courts of military proceedings because the constitutional safeguards should mean the same things to soldiers and civilians. At the very least, the scope of inquiry by civil courts of court-martial convictions should

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[7] Karlen and Pepper, The Scope of Military Justice, 43 *J. Crim. L.* 285, 298 (1952).

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IN THE

Supreme Court of the United States

October Term, 1952

No. 422

ROBERT W. BURNS and HERMAN P. DENNIS, JR.,
Petitioners,

vs.

ROBERT A. LOVETT, Secretary of Defense, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

Opinion of Court Below

The opinion of the Court of Appeals (R. 21-56) is not yet reported.

Jurisdiction

The judgment of the Court of Appeals was entered on July 31, 1952 (R. 57), and was amended on August 25, 1952 (R. 58). Petition for writ of certiorari was filed on October 29, 1952 and was granted December 15, 1952 (R. 58). Jurisdiction of this Court rests on Title 28, United States Code, Section 1254, subsection 1.

Statement

Petitioners are Negro Americans and citizen soldiers now being held by military authorities at United States Air Force Far Eastern Command, APO 500 under sentence of death. On May 9, 1949, and on May 29, 1949, petitioners Herman Dennis, Jr. and Robert Burns were respectively tried and convicted for the rape murder of Ruth Farnsworth, a white civilian, by general courts-martial convened on the Island of Guam at Headquarters, 20th Air Force, APO 234.

The judgments of the courts-martial were approved by the convening authority, found legally sufficient by the Judge Advocate General's Board of Review and the Judicial Council, and the sentences of death were orderd executed by the President (R. 1, 2, 7, 8, 9, 10, 16, 17). Petitioners filed timely petitions for new trials with the Judge Advocate General, and on January 28, 1952, these petitions were denied (R. 2, 9).

At this point, all available remedies provided within the military establishment had been exhausted, and the present collateral attacks on the validity of the courts-martial judgments were instituted in the District Court.

On January 7, 1949, petitioners were surrendered to the custody of federal civil authorities on Guam by the United States Air Force (R. 2, 10).[1] Petitioner Robert Burns was held by civil authorities for several weeks incommunicado and without process in a death cell at the Agana Jail. He was subjected to continuous questioning, beaten and denied edible food in violation of the Constitution of the United States and the laws of Guam (R. 2, 3).[2]

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[1] At that time the United States Navy was charged with administering the civil government of the Island of Guam.

[2] Penal Code of Guam, Sections 686, 780, 825. The text of these provisions is set out in an appendix to the petition for writ of certiorari at pp. 28-30.

He was not allowed to consult counsel during the entire period he was held by Guam authorities (R. 3). As a result of physical and mental duress, the other two accused—petitioner Herman Dennis and one Calvin Dennis—signed involuntary confessions implicating this petitioner in the crime for which he was ultimately convicted (R. 3).

On or about January 30, he was returned to the custody of the Air Force by civil authorities (R. 3). After the Air Force regained custody, continued pressure and intimidation was exerted by military authorities to extract a confession from him. Similar tactics were also used to get Calvin Dennis and Herman Dennis to testify against him (R. 3). These efforts did result in Calvin Dennis being a witness for the prosecution at petitioner's trial. That testimony has now been repudiated by Calvin Dennis as being false, perjured, and suborned by the prosecution (R. 4).

Burns was denied the right of consultation with counsel by military authorities until one day before his trial (R. 3), and important evidence tending to show his innocence was suppressed (R. 4). The entire proceedings were conducted in an atmosphere of hysteria and terror in violation of due process of law (R. 4).

Petitioner Herman Dennis was held incommunicado, without process and in solitary confinement in the Agana Jail by Guam police officers from January 7 until January 17, 1949. He too was subjected to continuous questioning, beaten and denied sleep and food (R.11). He was not allowed to consult counsel during the entire time he was held in the custody of the authorities of Guam (R. 11).

During the period of his detention by Guam authorities, he was not advised of his right against self-incrimination as required under Sections 686 and 780 of the Penal Code of Guam, Article of War 24 and the Fifth Amendment to the Constitution of the United States. He made four con-

fessions to police authorities between January 11 and January 14, which were the result of physical and mental duress, protracted interrogation, threats, promises and the use of a lie detector (R. 11). The texts of these confessions were dictated by police officers, and subsequently petitioner repudiated them as false (R. 11). Certain pubic hairs were taken from his person and subsequently used against him in violation of his right against self-incrimination under the laws of Guam, the Articles of War and the Constitution of the United States (R. 12).

On or about January 29, petitioner was returned to the custody of military authorities and was not afforded an opportunity to consult counsel until shortly before his court-martial trial which began on May 9, 1949 (R. 11). Evidence unlawfully obtained by Guam police was introduced against petitioner at his trial in violation of his rights under the Constitution and the Articles of War (R. 12). Irrelevant, immaterial and inflammatory statements deliberately calculated to prejudice petitioner's cause were also introduced (R. 12). Important evidence tending to show his innocence was suppressed (R. 12); the prosecution sought to procure witnesses to perjure themselves and intimidated and threatened those who sought to help this petitioner (R. 12). This trial was also conducted in an atmosphere of hysteria and terror (R. 12-13).

The above-stated allegations, supported by affidavits, were the bases for petitions for writ of habeas corpus filed in the District Court. Respondents filed motions to discharge the rule to show cause and dismiss the petitions on the ground that the petitions raised no questions reviewable by civil courts (R. 5-8, 15-18). The District Court, on April 10, 1952, granted the motions to dismiss (R. 18-20). Its opinions are reported at 104 F. Supp. 310, 312. The United States Court of Appeals for the District of Columbia Circuit, with one judge dissenting, affirmed the judgment on other grounds (R. 43). Whereupon, we brought the cause here.

Specifications of Errors

The Court of Appeals erred:

1. In not remanding the cause to the District Court for a hearing.

2. In prescribing a rule for entitlement to a hearing on the merits in habeas corpus proceedings which permits military authorities to effectively foreclose inquiry by civil courts into alleged violations of constitutional rights by courts-martial.

3. In refusing to hold that on habeas corpus a district court must make its own independent determination and evaluation of the evidence relating to the claimed invalidity of the judgment of the military tribunal.

Summary of Argument

The citizen-soldier being held on military authority under sentence of death pursuant to a court-martial conviction should have the right to attack that conviction on writ of habeas corpus on the ground that the military authorities violated his constitutional rights and denied him the substance of a fair trial. Where the petition for the writ makes out a *prima facie* case on this ground, entitlement to a hearing on the merits has been established. Indeed, in federal custody cases, the only prerequisites for a hearing on the merits are the showing on the face of the petition that there has been a denial of constitutional rights and that habeas corpus is the only effective remedy. In applying a different set of standards to this case, the Court of Appeals committed reversible error. Whatever merit its standards may have, the Court of Appeals, by not remanding the cause to the District Court for proceedings in the light of its decision, subverted its appellate jurisdiction, and its judgment should be reversed.

While federal courts on habeas corpus have imposed a rule of judicial self-restraint in many instances in state custody cases for the purpose of preserving the delicate federal-state balance, the bases upon which that rule rests are absent in the instant case. In state custody cases, when a petitioner seeks a writ in a federal court, his cause has already been extensively examined and reviewed by the state judicial machinery, and this Court has had an opportunity to review the cause on application for certiorari. This is not true in military cases for here petitioner's first contact with an independent judiciary occurs when he petitions the district court for the writ. Courts-martial are courts of limited jurisdiction; and where their judgments are attacked in federal courts, the duty is on the military authorities to affirmatively show that the military tribunals possessed the necessary ingredients for the rendition of a valid judgment. Under these circumstances, it is strange indeed to hold, as the Court of Appeals held, that federal courts on habeas corpus cannot look behind the military determination and independently inquire whether, in fact, the military judgment was valid.

The allegations in these petitions, viewed in their totality, establish a shocking picture of deviations from civilized concepts of justice. Unless petitioners are entitled to invoke the federal process to secure the protection which the Constitution affords citizens and soldiers alike, military courts will be free to treat persons within their jurisdiction in any fashion they desire. Since petitioners have made uncontroverted allegations which if true would clearly show a denial of the substance of a fair trial, they are entitled to a hearing on the merits in the District Court.

ARGUMENT

I.

The scope of inquiry on writ of habeas corpus extends to an examination of the military proceedings to determine whether basic constitutional guarantees have been violated.

The early cases involving collateral attacks on both military and civil convictions in habeas corpus proceedings were limited to narrow and formalistic notions of jurisdiction, *i.e.*, whether the ingredients essential to a valid assumption of jurisdiction existed. *Collins* v. *McDonald*, 258 U. S. 416; *Glasgow* v. *Moyer*, 225 U. S. 420; *Keizo* v. *Henry*, 211 U. S. 146; *Felts* v. *Murphy*, 201 U. S. 123; *McClaughry* v. *Deming*, 186 U. S. 49; *Carter* v. *McClaughry*, 183 U. S. 365; *Ex parte Reed*, 100 U. S. 13. See Mr. Justice Frankfuter concurring in *Sunal* v. *Large*, 332 U. S. 174. More recently, in civil cases, the scope of inquiry has been extended to ascertain whether the conviction has occurred in disregard of constitutional guarantees. *Waley* v. *Johnston*, 316 U. S. 101; *Smith* v. *O'Grady*, 312 U. S. 329; *Johnson* v. *Zerbst*, 304 U. S. 458; *Mooney* v. *Holohan*, 294 U. S. 103; *Moore* v. *Dempsey*, 261 U. S. 86. While lagging behind this expanded reach of the writ as to civil cases, lower federal courts in the past decade have begun to hold that on writ of habeas corpus a civil court is empowered to examine the military proceedings to determine whether specific constitutional rights were violated and whether the trial was in accord with fundamental notions of fairness implicit in our concept of due

process of law.[3] *Kuykendall* v. *Hunter*, 187 F. 2d 545 (C. A. 10th 1951); *Wrublewski* v. *McInerney*, 166 F. 2d 243 (C. A. 9th 1948); *United States ex rel. Innes* v. *Hiatt*, 141 F. 2d 664 (C. A. 3d 1944); *Schita* v. *Cox*, 139 F. 2d 971 (C. A. 8th 1944); *Schita* v. *King*, 133 F. 2d 283 (C. A. 8th 1943); see also *Montalvo* v. *Hiatt*, 174 F. 2d 645 (C. A. 5th 1949); *Becker* v. *Webster*, 171 F. 2d 762 (C. A. 2d 1949); *Henry* v. *Hodges*, 171 F. 2d 401 (C. A. 2d 1948); *Waite* v. *Overlade*, 164 F. 2d 722 (C. A. 7th 1947).

This Court has indicated in recent decisions, at least by inference, that on writ of habeas corpus a civil court may appropriately inquire into whether guarantees of due process have been observed by the military tribunal. *Whelchel* v. *McDonald*, 340 U. S. 122; *Humphrey* v. *Smith*, 336 U. S. 695; *Wade* v. *Hunter*, 336 U. S. 684. While *Hiatt* v. *Brown*, 339 U. S. 103 on which respondents relied in the lower court appears to be a restatement of the

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[3] This expanded scope of inquiry on writ of habeas corpus into whether the military trial violated petitioners' constitutional rights has been the cause of considerable comment. See Earle, The Preliminary Investigation in the Army-Court Martial System—Springboard for Attack by Habeas Corpus, 18 *Geo. Wash. L. Rev.* 67 (1950); Antineau, Habeas Corpus Relief from Courts-Martial Convictions, 28 *Tex. L. Rev.* 556 (1950), Antineau, Courts-Martial and the Constitution, 33 *Marq. L. Rev.* 256 (1949) for discussion in favor of review of military judgments by civil courts on writ of habeas corpus extending to determine whether constitutional safeguards had been observed. But see Werfel, Military Habeas Corpus, 49 *Mich. L. Rev.* 593, 699 (1951); Stein, Judicial Review of Determinations of Federal Military Tribunals, 11 *Brooklyn L. Rev.* 30 (1941); Paley, The Federal Courts Look at Courts-Martial, 12 *U. of Pitt. L. Rev.* 7 (1950) for arguments in favor of limiting the scope of inquiry by civil courts on writ of habeas corpus to formalistic and technical concepts of jurisdiction.

narrow, formalistic view of the permissible scope of inquiry,[4] it is there indicated that gross abuse of discretion with regard to the 8th Article of War would give rise to a defect in the jurisdiction of the military tribunal making it subject to collateral attack on writ of habeas corpus. Moreover, *Hiatt* v. *Brown,* when viewed in the light of *Whelchel* v. *McDonald,* gives little support to the notion that the proceedings of a military tribunal conducted in violation of constitutional rights are not subject to collateral attack.

The Court of Appeals is correct, we submit, in holding that on habeas corpus civil courts may examine military proceedings in order to determine whether a petitioner was accorded fundamental fairness. Therefore, insofar as the holding of the lower court sustains the right of a civil court to inquire into whether the military trial was conducted in compliance with constitutional guarantees, we think the court below is correct and that such a rule should be expressly adopted by this Court.

All persons tried in our civil courts are protected by the Constitution and may attack their convictions by habeas corpus on the ground that their trials failed to conform to requisite constitutional standards. It would be strange indeed if American citizen soldiers, whose primary duty is to defend our country and to preserve our democracy, are deprived of rights which our courts will scrupulously

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[4] The Court did say at page 110; "We think the court was in error in extending its review, for the purpose of determining compliance with the due process clause, to such matters as the propositions of law set forth in the staff judge advocate's report, the sufficiency of the evidence to sustain respondent's conviction, the adequacy of the pretrial investigation and the competence of the law member and defense counsel." None of these questions are involved in this case, and this statement cannot be taken to mean, at least without explicit clarification by the Court, that no due process questions can be raised on habeas corpus.

not be restricted by a rule of judicial self-restraint where the conviction complained of is for an offense not exclusively violative of military discipline or administration.

5. In applying its rule of judicial restraint the Court of Appeals concluded that inasmuch as the Judge Advocate General had determined petitioners' allegations an insubstantial basis for new trial, the District Court was precluded from making any contrary determination of their sufficiency. Since this conclusion cannot be based upon other vital considerations as in the state custody cases, petitioners submit that it is patently predicated upon a principle indistinguishable from res judicata and ignores this Court's admonition that res judicata is not applicable in habeas corpus proceedings. *Salinger* v. *Loisel*, 265 U. S. 224; *Waley* v. *Johnston*, *supra* at page 105.

6. This case involves solely federal habeas corpus jurisdiction of federal custody cases. Where a case involves persons in custody of federal authorities, the rule to be applied requires but two determinations: (1) whether the petition on its face alleges facts, which if proved, would establish a denial of a constitution right, and, (2) whether habeas corpus is the only effective means of preserving such rights. See *Glasser* v. *United States*, 315 U. S. 60; *Johnson* v. *Zerbst*, *supra*; *Wilfong* v. *Johnston*, 156 F. 2d 507 (C. A. 9th 1946); *United States ex rel. Innes* v. *Hiatt*, 141 F. 2d 664 (C. C. A. 3d 1944), and *Batson* v. *United States*, 137 F. 2d 299 (C. A. 10th 1943). Therefore, here it was incumbent upon the Court of Appeals to order a hearing on the merits in the District Court to provide petitioners with the opportunity to establish the truth of their assertions. See *Von Moltke* v. *Gillies*, 332 U. S. 708; *Johnson* v. *Zerbst*, *supra*; *Clawans* v. *Rives*, 104 F. 2d 240 (C. A. D. C. 1939); and see *Coggins* v. *O'Brien*, *supra*. *Cf. Price* v. *Johnston*, 334 U. S. 266; *Holiday* v. *Johnston*, 313 U. S. 342; *Walker* v. *Johnston*, 312 U. S. 275.

III.

Even if the rule announced by the Court of Appeals is considered applicable to this case, petitioners were entitled to a hearing on the merits in the District Court.

1. In the District Court, respondents' motions to discharge the rule to show cause and dismiss the petitions (R. 5-8, 15-18) and that court's opinions and judgments (R. 18-20) were directed to one issue: whether the permissible scope of the court's inquiry on a petition for writ of habeas corpus was limited to considerations of the lawful composition of the courts-martial before which petitioners were tried, jurisdiction of their person and offense, and the lawfulness of the sentences imposed. On appeal, this was the only question presented and argued.

The Court of Appeals below specifically passed on this question, stating in its opinion (R. 25):

> "Appellants say that the recent decisions of the Supreme Court have 'expanded' the concept of 'jurisdiction' for purposes of determining the right to habeas corpus. *That is correct* * * *" (emphasis supplied)

and further (R. 31):

> "We proceed, then, upon the premise that the protection of the Fifth and Sixth Amendments apply to courts-martial, except for the specific exception in the Fifth and the historic meanings at common law of the terms used in both amendments * * *."

It is petitioners' contention that at this point that the Court of Appeals, having determined that the District Court erroneously limited the scope of its jurisdiction to exclude consideration of a habeas corpus petition alleg-

ing violation of fundamental due process, erred in failing to remand the cause for application of the rule which it held to be dispositive of the petition.

United States Courts of Appeals have no original jurisdiction in habeas corpus proceedings. Title 28, United States Code, Section 2241. See *Adams* v. *United States,* 317 U. S. 269; *Brosius* v. *Botkin,* 110 F. 2d 49 (C. A. D. C. 1940). Since this is true, and because Title 28, United States Code, Section 2243, specifically provides that the court, justice or judge to whom an application for a writ of habeas corpus is made shall pass upon its sufficiency, it is evident that the Court of Appeals is incompetent to initially determine the sufficiency of such applications.

In the interest of justice, this Court and other federal courts have long disregarded legalistic exactitude in the examination of applications for the writ. Thus, even though the petition is insufficient in substance, it may be amended. See *Darr* v. *Burford,* 339 U. S. 200; *Holiday* v. *Johnston,* 313 U. S. 342, 350. Consequently, in considering propositions and matters which had not been considered, developed or determined by the District Court and in summarily precluding the possibilities of amendment, answer, traverse and hearing provided in Title 28, United States Code, Section 2243, the Court of Appeals subverted its appellate review in a manner which this Court regards as reversible error. See *Price* v. *Johnston, supra.*

2. Petitioners' allegations make out a *primie facie* case of denial of the substance of a fair trial by military authorities. A proper appraisal of petitioner's contention can only be obtained by viewing the allegations in their totality. *Betts* v. *Brady,* 316 U. S. 455. Viewed as a whole, petitioners' allegations paint a shocking picture of injustice highlighted by the "pressure of unrelenting interrogations" which this Court condemned in *Watts* v.

Indiana, 338 U. S. 49, 54; a working arrangement between two arms of the government in derogation of the rights of the accused which was denounced in *Anderson* v. *United States,* 318 U. S. 350, 356; "a plain disregard of the duty enjoined by Congress upon federal law officers" as defined in *McNabb* v. *United States,* 318 U. S. 332, 344; acts invading the privacy of an accused which in *Rochin* v. *California,* 342 U. S. 165 was described as "conduct which shocks the conscience." These factors, projected against a background which includes subornation of perjury, deprivation of counsel and favorable witnesses, suppression of evidence, the introduction of prejudicial and inflammatory testimony and the conduct of the trials in an atmosphere of mob hysteria and terror, renders inescapable the conclusion that "the whole proceeding is a mask", *Moore* v. *Dempsey,* 261 U. S. 86, 91, and that petitioners' trials lacked "that fundamental fairness essential to our concept of justice". *Lisenba* v. *California,* 314 U. S. 219, 236.

If these circumstances do not warrant issuance of the writ, it is difficult to conceive what additional ingredients are necessary to merit classification as the "exceptional case." Indeed, if, as the Court of Appeals concluded, the circumstances shown do not picture the denial of the substance of a fair trial, if the allegations are insufficient to affect the fundamental fairness of the courts-martial, and if the disposition accorded petitioners' claims does not impair the validity of the subsequent military appellate determinations sufficient to characterize this as an "exceptional case", petitioners submit that adherence to the rule applied by the Court of Appeals effectively accomplishes suspension of the writ of habeas corpus in cases involving solider citizens in violation of Article I, Section 9, Clause 2 of the Constitution. See *Tarble's Case,* 13 Wall. 397, 413-414. *Cf. United States* v. *Hayman,* 342 U. S. 205. Furthermore, it cannot be said in habeas corpus arising out of court-martial convictions that the rule merely operates to "minimize the difficulties encountered in habeas corpus

hearings by affording the same rights in another and more convenient forum'' *United States* v. *Hayman, supra.*

This is the type of case with which this Court and the federal courts have dealt with on innumerable occasions. A Negro is accused of a crime of passion or violence against a white woman. Such accusations test the strength of our constitutional guarantees. This Court, however, has evolved standards and restraints which must be observed in order to prevent convictions under such circumstances from being acts of tyranny and injustice rather than the impartial application of the law. See *Chambers* v. *Florida,* 309 U. S. 227; *Watts* v. *Indiana, supra.* We submit, the military proceedings here violated all standards of civilized judicial conduct, and that petitioners should have been allowed to prove in the District Court the merits of their contentions.

IV.

The use by military authorities of evidence illegally secured in petitioners' courts-martial renders these convictions void.

As the facts reveal, petitioners were released by military authorities to custody of the civil authorities of Guam, jailed and held incommunicado by the latter without process for a prolonged period of time. This procedure was in clear violation of Sections 686, 780 and 825 of the Penal Code of Guam, which guarantee to the accused the right and visitation of counsel, privilege against self incrimination, and protection against detention by police authorities without process.

In our view these provisions were applicable to all persons within the jurisdiction of that government. Had petitioners been tried by the civil authorities and if the evidence obtained by the civil police under the circumstances set forth here had been introduced at their trials, the convic-

tions would unquestionably be invalid under the rule stated by this Court in *McNabb* v. *United States, supra.*

The Court of Appeals dismissed this argument on the ground that the *McNabb* rule was merely a rule of evidence. But this, we submit, does not dispose of petitioners' contention. The question posed is whether courts-martial may lawfully use evidence illegally obtained by another arm of the federal government. The 38th Article of War, which was in effect at the time these courts-martial took place, provides that the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States shall apply insofar as the President deems them practicable. Rule 124 provides that insofar as not otherwise prescribed in the Manual, the rules of evidence generally recognized in the trial of criminal cases in district courts shall be applied. *Manual for Courts-Martial, United States Air Force* 150 (1949). Thus, in the absence of any contrary regulations the courts-martial should have applied the rules in use in the district court and evidence unlawfully obtained should not have been admitted. See *McNabb* v. *United States, supra.* The fact that civil authorities unlawfully obtained the evidence introduced at the courts martial does not make such evidence admissible. *Anderson* v. *United States, supra.*

Rule 127, which specifically deals with the subject of admissibility of confessions, contains nothing which expressly negatives the applicability of the *McNabb* and *Anderson* rules to courts-martial. *Manual for Courts-Martial, United States Air Force* 156-158 (1949). In fact the rule can well be interpreted as adopting the *McNabb* principle. Rule 127 states that: "No statement, admission, or confession of an accused obtained by use of *coercion* or *unlawful influence* shall be received in evidence in any courts-martial." (emphasis supplied). The use of the phrase "coercion or unlawful influence" clearly implies that "unlawful influence" constitutes something in addition to "coercion." Certainly the term "unlawful influ-

ence" might well refer to a confession obtained during a period of unlawful detention.

It should be noted here that in other instances where the courts-martial Manual intends to render inapplicable to courts-martial a particular federal rule, this intention is expressed in no uncertain terms. For example, Rule 138 makes lawful a search of property owned or controlled by the United States when authorized by the commanding officer having jurisdiction over the locality where the property is located. This rule was intended to limit the application of the doctrine of *Weeks* v. *United States*, 232 U. S. 383, to courts-martial. But no such express provision negatives the applicability of the *McNabb* and *Anderson* rules to military proceedings.

The military reviewing authorities disregarded this contention on the ground that Chapter 35 of the Civil Regulations With the Force and Effect of Law in Guam (1947) operated with regard to military personnel in lieu of Sections 825 and 847-849 of the Penal Code of Guam.[8]

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[8] Chapter 35 provides:

"1. Whenever a member of the military forces of the United States is arrested by civil authorities, the offender shall be taken to the police station where the charge shall be investigated. If the charge is considered substantial, he may then be released upon his own cognizance or turned over to military authorities. Should the chief of police consider the charge of a sufficiently serious nature so that special action is necessary or that the release of the offender would be detrimental to his own or the public welfare, the offender may be held pending action on the report of the chief of police to military authority.

"2. The chief of police will, within 24 hours of the arrest, forward a report to the commanding officer of the offender and will set forth therein the offense alleged, such details as may be necessary to permit the commanding officer to take intelligent action on the case, and the names of such witnesses as may be available. He will also forward one copy of this report to the office of the Governor, for file."

It should be noted at the outset that neither the Civil Regulations nor the Penal Code expressly authorize Chapter 35 to operate in lieu of the Penal Code in cases involving military personnel. Moreover, it is submitted, Chapter 35 can have no application to this case.

The plain meaning of this chapter is that its provisions shall be followed when military personnel are initially apprehended by civil authorities on Guam. In the instant case, petitioners were actually surrendered by the military to officials of the civil government. This fact in itself serves to render Chapter 35 inapplicable here, for it can have no possible meaning in the context of this case.

Further, the record makes it clear that both the military and the civil officers contemplated that petitioners would be tried by civil authorities. The very fact that the military released petitioners strongly leads to this inference. But even more persuasive is the revelation at pages 227, 232 of the court-martial record of petitioner Herman Dennis that he was actually arraigned before a magistrate after confessions were extracted from him. Under these circumstances, neither the military nor the civil authorities can now validly claim that the protections afforded by the Penal Code of Guam were inapplicable to these petitioners.

The rule of the *McNabb* case is much more than an important rule of evidence. It represents the expression of a strong policy that federal courts cannot convict an accused on the basis of evidence obtained during a period of prolonged unlawful detention and interrogation. The use of such evidence would vitiate any conviction in a federal court. Petitioners submit that the use of such evidence by these courts-martial and the failure of the reviewing authorities to correct this clear error of law vitiates their convictions.

Conclusion

WHEREFORE, it is respectfully submitted that the judgment of the Court of Appeals should be reversed and the cause remanded for a hearing on the merits.

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